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Witness for the Self: Miranda v. Arizona's Political Theology

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WITNESS FOR THE SELF: *MIRANDA V. ARIZONA*'S POLITICAL THEOLOGY

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"A man cannot represent himself as wicked" – Halakhic principle

"For the assumption was that the most ancient thing was the most worthy, and that the oath was the most worthy thing" – Aristotle, citing the most ancient authorities

"The very words of God are oaths" – Philo of Alexandria

In *Miranda v. Arizona*,[1] the Supreme Court argued that the Fifth Amendment is "the essential mainstay of our adversary system," but it is quite the understatement when Chief Justice Warren adds that the privilege against self-incrimination "is founded on a complex of values."[2]

The complexity is psychoanalytical, philosophical, and theological. A knotty relationship among self, speech, and order sits behind testimony we give of ourselves. Wittgenstein and Lacan have revealed the puzzles of speech and order. Descartes may have been certain that the ego is a thinking thing, but the self remains one of the most perplexing topics in all of philosophy. Aquinas was sure that you and I are discrete selves, but Averroes had argued that mind was a single universal. David Hume denies there is a self at all, Schopenhauer says it is an illusion, and my undergraduate philosophy teacher, Arnold Zuboff—originator of the Sleeping Beauty paradox in game theory—insists you and I are one identical individual.[3] And, for good measure, Darwin and Freud think you are your parents.

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[1] 384 U.S. 436 (1966).

[2] *Id.* at 460.

[3] Arnold Zuboff, *IX—Moment Universals and Personal Identity*, 78 PROC. ARISTOTELIAN SOC'Y 141, 145-47 (1978).

What philosophical position respecting self, speech, and order does *Miranda* stake out? In its discussion of testimony, *Miranda* puts substantial emphasis on self-adequation, but rule of law puts the emphasis on establishment, on a public accounting of speech and order. This public accounting explains the historic role of oaths, a prominent topic in *Miranda*.

This essay argues that the Court's reasoning is ultimately theological: it relies on an account of language made prominent in the Protestant Reformation. In the articulation of the Court, Miranda rights are Anabaptist rights. Miranda rights might be very good things, but the Court's reasoning is dubious.[4] In a well-cited article, Rosenberg and Rosenberg lament that criticisms of Miranda rights have made in-roads and "devitalized" the Court's decision.[5] They recommend the US model the privilege against self-incrimination on the Halakhic rule that "a man cannot represent himself as wicked," which, as Sam Levine puts it, operates categorically.[6] Thomas Aquinas explains why there are significant pressures to water down any absolute rule. His treatment of oaths offers a significantly different relationship among self, speech, and order than *Miranda*. And that is not a surprise.

THE COURT'S HISTORY OF OATHS

It is noteworthy that Chief Justice Warren's history of self-incrimination in English law is the history of Anabaptist conflict with the medieval idea of an oath,[7] that is, a history of Protestant dissent[8]

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[4] Much the same might be said of human rights. Pierre Manent has identified their tortured metaphysical logic. *See* PIERRE MANENT, NATURAL LAW AND HUMAN RIGHTS: TOWARD A RECOVERY OF PRACTICAL REASON (Ralph C. Hancock trans., 2020).

[5] Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 93 (1989).

[6] Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT'L & COMP. L. REV. 257, 264 (2006). *See* 1 SAMUEL J. LEVINE, JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY 134 (2018).

[7] Pierre Manent argues that the Renaissance began a reform movement "to overcome the Catholic disorder." PIERRE MANENT, MONTAIGNE: LIFE WITHOUT LAW 6-7 (Paul Seaton trans., 2020). This disorder assumes a "relaxed play between words and actions." *Id.* In the Middle Ages, rituals, liturgies, festivals, and protocols of church courts mediated divine law and human action. Instead, Luther proposed that the ceremonies of ritual be replaced by the crystal-clear adequation of the mind

from canon law.[9] A sketch of this history precedes the main contention of *Miranda v. Arizona*. Quoting police training manuals, the Court documents police tactics: isolate the subject away from home turf, posit his guilt, and frame questions so as to convey you are merely looking for confirmation of what is thoroughly known by other evidence. Critical, say the police manuals of the `50s and `60s, is that detectives generate an "atmosphere of domination." The Court found these tactics contrary to human dignity and incompatible with one of the "[n]ation's most cherished principles," the privilege against self-incrimination.[10] The Court noted both that through into the `30s incommunicado interrogation sometimes led to beatings, hangings, and whippings and that Scottish court rulings attest to an earlier time when police would interrogate in a person's home and only in the presence of family or friends.[11] About incommunicado interrogation, the Court reasons: because voluntary confessions "rank[] high in the scale of incriminating evidence," any confession is likely to conclude in the loss of freedom.[12] "Incommunicado interrogation" being "inherently intimidating" makes persons forsake their liberty. This perverse outcome must be forestalled by protocols that reaffirm the privilege against self-incrimination. A history of oaths precedes this analysis because the "compelling atmosphere" of police interrogation is akin to an oath demanding confession. Without *Miranda*'s protections, the suspect concedes the grip of the state's sov-

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to divine law: human actions are to follow the words of Scripture. Conversely, Machiavelli proposed that the word of God be reduced to the action of a prince: in a state that flexes, divine law is whatever the civil law says. These new ideals of reform, Manent argues, sought "to suppress the play and overcome the distance between action and word." *Id*. at 5.

[8] Anabaptist Protestantism rejects as un-Biblical, ecclesiastical hierarchies, infant baptism, and oath-taking. This makes them "low-church" and *dissenters* because they dissented from the *Protestant* "high-church" establishment, which retained much of Catholic practice, theological doctrine, and holdings of ecclesiastical courts. It is these two varieties of Protestantism that fought the English Civil War. English Catholics tended to side with Cromwell's "low-church" dissenters. *See* Edward Toby Terrar, *Gentry Royalists or Independent Diggers? The Nature of the English Catholic Community in the Civil War Period of the 1640s*, 57 *SCI. & SOC'Y* 313 (1993). To this day, there are parts of the Church of England established by Henry VIII whose liturgies far surpass contemporary Catholicism for pomp.

[9] NICHOLAS BERDYAEV, THE END OF OUR TIME 29-30 (Donald Attwater trans., 1933).

[10] Miranda v. Arizona, 384 U.S. 436, 458 (1966).

[11] *Id.* at 446, 448.

[12] *Id.* at 442.

ereignty over the self, very like the infamous oath *de veritate dicenda* (the truth must be said).

In his two-volume *Jewish Law and American Law: A Comparative Study*, Sam Levine writes, "perhaps the most prominent references" to Jewish law are found in *Miranda v. Arizona*.[13] Warren, writing for the majority, cites both the Talmudic prohibition against self-incrimination and Rabbi Lamm's article, "The Fifth Amendment and Its Equivalent in Halakhah." This article turns to Sigmund Freud to explore the Talmudic prohibition,[14] which, though astute, is curious, since psychoanalysis is confessional and extractive.[15] Psychoanalysis rejects the Anabaptist account of the self, which *Miranda* enshrines: paragraph 42 of the decision, citing past precedents, speaks of the "individual's substantive right, a right to a private enclave where he may lead a private life."[16] Critically, the Court invokes its own words: "In sum, the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the

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[13] 1 LEVINE, *supra* note 6, at 10.

[14] Norman Lamm, *The Fifth Amendment and Its Equivalent in the Halakhah*, 5 JUDAISM 53, 56 (1956). In Lamm's presentation, Talmudic law is akin to stating a Kantian categorial imperative (an act cannot be formulated as a rule if it involves a contradiction). For example, you cannot be a witness to your own malfeasance, for, in confessing, you undermine your own character and thus standing as a reliable witness. *Id*. at 54. As a consequence, the Halakhic principle puts in question the whole idea of legal confession. Lamm was especially interested in using Freud to explore Maimonides's ideas about the psychological "aberrations" basic to being human. He was especially interested in Freud's idea of a primary fracture: "Its function is to ensure the total victory of the Life Instinct over its omnipresent antagonist." *Id*. at 59. The death instinct—"the omnipresent antagonist"—elucidates Maimonides's worry that self-incrimination may well be used to achieve suicide. Thus, the divine prohibition is "saving man from his own destructive inclinations." *Id.* at 59. This is a useful analysis, but it still rather assumes a tactical awareness on the part of the self who manipulates the law. In psychoanalysis, the law is more constitutive of our agency than Lamm concedes.

[15] An analyst makes a "secret summons" on the patient. JACQUES LACAN, *Variations on the Standard Treatment*, *in* ÉCRITS 269, 276 (Bruce Fink trans., 2006); *cf.* LACAN, *Aggressiveness in Psychoanalysis*, *in* ÉCRITS, *supra*, at 82. In dream interpretation, the analyst, through deft method, extracts latent meaning from the patient's recounting of the dream. *See* Brian McGuinness, *Freud and Wittgenstein*, *in* WITTGENSTEIN AND HIS TIMES 27, 30-31 (Brian McGuinness ed., 1982).

[16] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

unfettered exercise of his own will."[17] Critically, because the idea of unfettered speech as an expression of self-possession is tricky.[18]

Reading *Miranda*, you would have no idea that canon and medieval common law included the principle that no one is to be compelled to accuse himself.[19] The privilege against self-incrimination was widely observed in the Middle Ages, but there were exceptions, notably, cases of heresy. Heresy could trigger the use of the oath *de veritate dicenda*. The oath (also known as the *ex officio* oath[20] or in American lore the Star Chamber oath) required the accused, before knowing the charges, to answer all questions truthfully under penalty of contempt.

Though its legitimacy was always disputed by medieval lawyers, the oath *de veritate dicenda* trumped the privilege against self-incrimination.[21] The great flashpoint in the use of the oath came in the seventeenth century,[22] and, for contemporary reasons, the Warren Court took note. An important question is why the seventeenth century? Critical to the politics and religion of the age was the role of oaths in signaling allegiance.[23] This mattered in 1950s America, and

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[17] *Id.* (internal quotation marks omitted).

[18] Lacan argues that our speech is a function of our being stretched across a grid: the unconscious, what he terms the *enunciating subject*, and an ideal self-shaped in the mirror stage at the behest of the Other, what he calls the *subject of the statement*. *See* LACAN, *Kant with Sade*, *in* ÉCRITS, *supra* note 15, at 650.

[19] *See* E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 9 (1949) ("All that can be safely asserted is that the common lawyers both in the second half of the 13th and all of the 14th century and under Henry VIII and Elizabeth resisted the inquisitorial procedure of the spiritual courts, whether Romish or English, and under Elizabeth began to base their opposition chiefly upon the principle that a person could not be compelled to furnish under oath answers to charges which had not been formally made and disclosed to him . . . But there can equally be no doubt that to the common lawyers a system which required a person to furnish his own indictment from his own lips under oath was repugnant to the law of the land."). This is from a law review article that *Miranda* actually cites.

[20] R. H. HELMHOLZ, THE SPIRIT OF CLASSICAL CANON LAW 155 (1996).

[21] R. H. Helmholz, *The Privilege and the Ius Commune: The Middle Ages to the Seventeenth Century*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION 17, 31-32 (1997).

[22] Nathan Dorn, *John Lilburne, Oaths and the Cruel Trilemma*, LIBRARY OF CONGRESS (Apr. 25, 2013), https://blogs.loc.gov/law/2013/04/john-lilburne-oaths-and-the-cruel-trilemma/.

[23] In 1608, James I of England/James VI of Scotland published the pamphlet, "An Apology for the Oath of Allegiance against the Jesuit Cardinal Bellarmine," wherein he argued that Catholics "should make a clear profession of their resolution, faithfully to persist in their obedience unto me," the oath a "pledge of their fideli-

today. The reason is that oaths touch upon rule of law, and thus how societies cohere.

Writing in 1956, Norman Lamm observed an on-going battle between the Warren Court and a Congress compelling speech. *Miranda* would be one in a series of judgments provoked by, as Lamm puts it, the "Communist issue." *Miranda* dates to 1966, but in 1957, Warren wrote in *Watkins v. United States*:

> The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous.[24]

As we will see, oaths and the idea of "forced revelations" compel us to wonder whether "the reaction in the life of the witness" is more disastrous than subversion of social order. We need to track the robust relationship between self, language, and order.

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ty." KING JAMES VI AND I, KING JAMES VI AND I: POLITICAL WRITINGS 85-86 (Johann P. Sommerville ed., 1994).

[24] 354 U.S. 178, 197 (1957). The Black Lives Matter political movement took American universities by storm in summer 2020 and faculties and college presidents made pledges to expurgate unconscious bias in faculty, staff, and students: "We will make implicit bias training mandatory for all students, faculty, and staff. In addition, the board of trustees has committed itself to participating in the training." Office of The President, *Joint Statement from Trustees and Senior Leadership,* DARTMOUTH (July 01, 2020), https://president.dartmouth.edu/news/2020/07/joint-statement-trustees-and-senior-leadership. Professor of Classics at Princeton, Joshua Katz, labels this new demand for conformity of belief and value, a Star Chamber requirement. *See* Joshua T. Katz, *A Declaration of Independence by a Princeton Professor*, QUILLETTE (July 8, 2020), https://quillette.com/2020/07/08/a-declaration-of-independence-by-a-princeton-professor/.

OATH AND LANGUAGE

Oaths have their origin in a basic human problem: the equivocity of language means we easily misunderstand one another.[25] Rule of law must contend with this problem.[26] Centuries before Senator McCarthy, Anabaptists objected to oaths, because they are speech required by the state.[27] Anabaptists reject the legitimacy of *any* state and to take an oath is to concede that the state is greater than the Spirit.[28] Anabaptists were frequently executed for this conviction. Before state interrogation, Anabaptist treatises counselled, "all words and deeds are to be confirmed by a truthful yes or no, and nothing added thereto."[29]

In *Miranda*, and skipping over a swath of legal history,[30] Warren cites the 1637 trial of dissenter John Lilburn as "the critical historical event"[31] in the development of the privilege against self-incrimination. Lilburn refused the oath *de veritate dicenda*, and Warren gives us his words: "no man's conscience ought to be racked by oaths imposed."[32] The trial was a watershed, the Court contends, for after it the oath fell out of use. Warren observes that no statute or judicial decision cancelled the oath: its use withered, says Warren, "up-

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[25] "The oath . . . was concerned with the very consistency of human language." GIORGIO AGAMBEN, THE SACRAMENT OF LANGUAGE: AN ARCHAEOLOGY OF THE OATH 8 (Adam Kotsko trans., 2011).

[26] More will be said later, but consider Wittgenstein's revealing example: "Suppose you came as an explorer into an unknown country with a language quite strange to you. In what circumstances would you say that the people there gave orders, understood them, obeyed them, rebelled against them, and so on?" Rush Rhees, *Wittgenstein on Language and Ritual*, *in* WITTGENSTEIN AND HIS TIMES, *supra* note 15, at 69, 70-71.

[27] Christian Neff, Harold S. Bender & William Klassen, *Oath,* GLOB. ANABAPTIST MENNONITE ENCYCLOPEDIA ONLINE, https://gameo.org/index.php?title=Oath (last modified Dec. 7, 2019).

[28] Levelers understood their objection to oaths as basic to their non-conformity in opinion and practice of religion. THE ENGLISH LEVELLERS 79 (Andrew Sharp ed., 1998).

[29] Christian Neff, Harold S. Bender & William Klassen, *supra* note 27 (referring to the Concept of Cologne, 1591; reflecting Matthew 5:33-37).

[30] The Court focuses on the oath as a tool of the Star Chamber but fails to note that this chamber was an *innovation* of Henry VIII, a chamber whose practice of law *for this reason* was arbitrary, Adam Smith contends. *See* ADAM SMITH, LECTURES ON JURISPRUDENCE 95 (R.L. Meek, D.D. Raphael & P.G. Stein eds., 1982).

[31] Miranda v. Arizona, 384 U.S. 436, 459 (1966).

[32] *Id.*

on a general and silent acquiescence of the courts in a popular demand."[33] If I were a follower of Leo Strauss, here, I'd know that Warren was trying to cover his tracks. But let's just say Warren was breathtakingly naïve. Use of the oath withered because John Lilburn's older brother, Robert, signed the death warrant of Charles I in 1649 after the king lost the English Civil War. Robert Lilburn was a life-long professional soldier, a battle-hardened officer of Cromwell's New Model Army. As recent historical analysis of the oath shows, its use was settled by war.[34] The English Civil War was a fight between high and low church Protestants,[35] the dissenters winning.

Anabaptist arguments reversed the reasoning justifying oaths. Thomas Aquinas argued that oaths were necessary on account of the "frailty of the human tongue."[36] From Christian scripture, Aquinas quotes *James* 3:2: "If any man offend not in word, the same is a perfect man."[37]

Given the ease with which humans misunderstand one another, Aquinas proposed that calling upon God to guarantee the meaning of a person's speech was necessary to settle public controversy.[38] The idea was that invoking God was to have God give testimony to the meaning of the words spoken, to engrave in straight lines, as it were, their meaning. Rejecting Aquinas's providentialism,[39] Anabaptist treatises cautioned, "we cannot captivate or bind anyone's conscience to your understanding of it."[40] God as a witness is not going to offer the solution Aquinas thinks, for Anabaptists believe language is inherently equivocal; sworn testimony cannot foreclose the possibility of misconstrual. Lawyers, who down through the ages have made millions from disputing the language of contracts, might see their point.

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[33] *Id.* at 443.
[34] *See* R. H. Helmholz, *supra* note 21, at 17, 31-32.
[35] *See supra* note 7 and accompanying text. *See generally* Terrar, *supra* note 8.
[36] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 89, Art. 3, Reply Obj. 3 (The Fathers of the English Dominican Province trans., 1922).
[37] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 89, Art. 2, Obj. 3 (The Fathers of the English Dominican Province trans., 1922).
[38] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 89, Art. 2 (The Fathers of the English Dominican Province trans., 1922).
[39] Aquinas rejects the Anabaptist do-not-test God Argument. ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 89, Art. 2, Obj. 3 (The Fathers of the English Dominican Province trans., 1922).
[40] Christian Neff, Harold S. Bender & William Klassen, *supra* note 27.

However, Aquinas thinks language is analogical. Mindful of the opening of John's Gospel that Christ is the Word, Aquinas reasons that language cannot be equivocal, otherwise we could never adequately speak of God. Of course, we cannot attain the clarity of divine insight, either: Isaiah reminds us, "For my thoughts are not your thoughts, neither are your ways my ways."[41] So, language is not univocal, either. There is only one other option: Language must be analogical, a pretty secure way to convey meaning. There is a constitutive, but not meaning-canceling *play* between word and action.

Being as such, what Thomists call the *analogia entis*, has a playful character,[42] and this play is addressed through the ceremony of oath-taking. On the one side there is theoretical reason, which is self-warranting (univocity), and on the other practical reason tracking the varieties of action and murkiness of motivation (equivocity). Aquinas argues that speculative propositions have surety from reason, but our speech about discrete contingent facts need a witness.[43] It is the witness that draws speech about the contingencies of acts and motivations towards the surety of reason. The witness helps a person make sense of herself, therefore.[44] This idea is strongly expressed in Adam Smith's development of the idea of the spectator. It is found in psychoanalysis and in Wittgenstein's idea that individual mental occurrences are manifestations of establishment.[45] The witness holds the analogical position, a position further cemented by the solemnity of sworn testimony (an oral rite).[46] This explains the protocols and theatrics of examination and cross-examination of witnesses at trial.[47]

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[41] *Isaiah* 55:8-9 (New International Version).

[42] For the *analogia entis* as play, see generally GRAHAM JAMES MCALEER, ERICH PRZYWARA AND POSTMODERN NATURAL LAW: A HISTORY OF THE METAPHYSICS OF MORALS (2019).

[43] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 89, Art. 1 (The Fathers of the English Dominican Province trans., 1922).

[44] For an interesting example, see the TV program *Billions: Not You, Mr. Dake* (Showtime Entertainment May 6, 2018), when the state's attorney, Chuck Rhoades, gets Dr. Gilbert to acknowledge his guilt. The guilt is existential, not legal. Indeed, the realization of guilt only happens as a consequence of the incommunicado interview *Miranda* warns against and outlaws.

[45] *See* J. C. Nyiri, *Wittgenstein's Later Work in Relation to Conservatism*, *in* WITTGENSTEIN AND HIS TIMES, *supra* note 15, at 44, 44.

[46] AGAMBEN, *supra* note 25, at 4.

[47] There is an extremely interesting comedy sketch by the old British comic duo *The Two Ronnies* that picks up on the significant idea of trial as game and jest. *See*

Anabaptists believing in self-adequation tilt speech towards univocity, but thereby undersell a constitutive fact about language, that it stems from ritual and has a performative communal core. Wittgenstein proposes: "Our language is an embodiment of ancient myths. And the ritual of the ancient myths was a language."[48] The "sacral universe" (Aquinas) has a ludic character[49] and the ceremony of an oath invoking God as a witness to meaning[50] keys into the ritual constitutive of language as such. It is for this reason that the privilege against self-incrimination could be trumped by heresy and apostasy trials, charges of faithlessness.

TRUST AND LANGUAGE

Defending oaths, Aquinas argues logically enough. Law coerces physically—police can enter my home in the early hours of darkness, shoot my dog, drag me from my bed, watch me as I dress, and take my computer. It seems plausible then that law can compel mentally. This brings us to social order and faithlessness. Faith, once embraced,[51] is an obligation, and in Roman law, comments Aquinas, an obligation requires fulfillment "by legal necessity."[52] This is why the Internal Revenue Service has swat teams. Grimly, but coherently,[53] Aquinas also adds that "bodily compulsion" can be

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Bill Cotton, *The Two Ronnies Courtroom Quiz*, YOUTUBE (Dec. 21, 2011), https://www.youtube.com/watch?v=QOn3gF_OQag.

[48] Rush Rhees, *Wittgenstein on Language and Rituals*, *in* WITTGENSTEIN AND HIS TIMES, *supra* note 15, at 69, 69. In a short essay inspired by Erich Przywara, Carl Schmitt argues that thinking is linked to festive sacred acts of staking a claim to land, the geography of which then orients the mind. CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF JUS PUBLICUM EUROPAEUM 74-75, 341, 348 (G. L. Ulmen trans., 2006).

[49] This explains why the Greek gods swore oaths. *See* AGAMBEN, *supra* note 25, at 18.

[50] God knows all, including the meaning of our speech, so perjury before God is impossible.

[51] Baptism is the central sacrament of Catholicism in which faith in Christ is acknowledged: a sacrament in Roman law is an oath. *See* ÉMILE BENVENISTE, INDO-EUROPEAN LANGUAGE AND SOCIETY 389-98 (Elizabeth Palmer trans., 1973) (discussing *Ius* and the Oath in Rome), https://chs.harvard.edu/CHS/article/display/3958.3-ius-and-the-oath-in-rome.

[52] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 10, Art. 8 (The Fathers of the English Dominican Province trans., 1922).

[53] Lacanian psychoanalysis predicts this. Law is part of the shape of the unconscious and so are the archaic imagos of broken bodies. JACQUES LACAN, *Aggres-*

used[54] to force a fresh statement of faith the heretic had once expressed.

Obligations can be extractive, and oaths can express that fact, Aquinas contends.[55] Knowing his Roman law as well as Aquinas, this is why John Lilburn refused the oath.

Why is an oral rite inextricable from faith? If words bear witness to faith, why not just mouth the words silently? This was Luther's proposal. Replace solemn ceremonies of ritual with the crystal-clear adequation of the mind to divine law: an adequation secured by privately reading the words of Scripture. For Aquinas, this interior adequation is a false accounting of our psychology (borne out by Lacan) and a false accounting of speech (borne out by Wittgenstein). Aquinas:

> Therefore, just as when the life of the body is taken away, man's every member and part loses its due disposition, so when the life of justice, which is by faith, is done away, disorder appears in all his members. First, in his mouth, whereby chiefly his mind stands revealed; secondly, in his eyes; thirdly, in the instrument of movement; fourthly, in his will, which tends to evil. The result is that "he sows discord," endeavor-

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siveness in Psychoanalysis, *in* ÉCRITS, *supra* note 15, at 87-90. Lacan offers historical confirmation: "Beginning in religious societies with the ordeal and the test of sworn oath, in which the guilty party is identified by means of belief or offers up his fate to God's judgment, probation demands ever more of the individual's involvement in confession as his juridical personality is progressively specified. This is why the entire humanist evolution of Law in Europe—which began with the rediscovery of Roman Law at the University of Bologna and extended to the entire appropriation [*captation*] of justice by royal jurists and the universalization of the notion of the Law of Nations [*Droit des gens*]—is strictly correlative, in time and space, to the spread of torture that also began in Bologna as a means in the probation of a crime. This is a fact whose import people apparently still have not gauged." JACQUES LACAN, *A Theoretical Introduction to the Functions of Psychoanalysis in Criminology*, *in* ÉCRITS, *supra* note 15, at 113.

[54] For graphic examples of coercing pleas in *eighteenth century* England, see Morgan, *supra* note 19.

[55] *To swear* in Latin is *jurare* and thus an oath "is established as though it were a principle of law." ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 89, Art. 1 (The Fathers of the English Dominican Province trans., 1922).

> ing to sever others from the faith even as he severed himself.[56]

Oaths make language cohere, which means they make the self's appetites cohere, a possibility stemming from the foundation of language in establishment.[57] Ruptures in faith sow discord because you can no longer trust the meaning of words or actions (Aquinas's mouth, eyes, and movement above). Cicero: "Whoever, therefore, violates his oath violates trust."[58] This is why the *ius publicum* in Roman law is defined as that "which consists in sacred things and rites, in priests and in magistrates."[59] It matches Wittgenstein's belief that language formation is keyed to the rituals of myth. Philo of Alexandria: "the very words of God are oaths and laws of God."[60] Language, religion, and law are co-terminus. Community fused with faith explains anthropological findings[61]: expensive grave goods are found in the earliest burial sites[62] and our earliest art is religious.[63]

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[56] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 12, Art. 1, Reply Obj. 2 (The Fathers of the English Dominican Province trans., 1922).

[57] A fuller explanation is given in the conclusion, but in the Lacanian mirror stage the self takes on coherence effectuated by the Other, the establishment of law and meaning, itself a mode of the name-of-the-father. For the role of the phallus in Lacan's thinking about identity, see Graham McAleer & Christopher M. Wojtulewicz, *Why Technoscience Cannot Reproduce Human Desire According to Lacanian Thomism*, 24 FORUM PHILOSOPHICUM 279, 279 (2019). An institutionalization of this is the trust. Trust was originally enacted by aristocrats taking oaths officiated by the church and huge family fortunes are still tended by fiduciaries. *See* BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT 39-45 (2016).

[58] AGAMBEN, *supra* note 25, at 23; *Cf.* DAVID NOVAK, ATHENS AND JERUSALEM: GOD, HUMANS, AND NATURE (2019).

[59] AGAMBEN, *supra* note 25, at 19.

[60] *Id.* at 20.

[61] *See* BARRY COOPER, PALEOLITHIC POLITICS: THE HUMAN COMMUNITY IN EARLY ART 75-80 (2020).

[62] ERIK TRINKAUS, ALEXANDRA P. BUZHILOVA, MARIA B. MEDNIKOVA & MARIA V. DOBROVOLSKAYA, THE PEOPLE OF SUNGHIR: BURIALS, BODIES, AND BEHAVIOR IN THE EARLIER UPPER PALEOLITHIC 32-33 (2014).

[63] *See, e.g.,* Jill Cook, *The Lion Man: An Ice Age Masterpiece*, THE BRITISH MUSEUM BLOG (Oct. 10, 2017) https://blog.britishmuseum.org/the-lion-man-an-ice-age-masterpiece/; Mark Wilson, *The World's Oldest Known Work of Art is Eerily Beautiful*, FAST COMPANY (Dec. 16, 2019), https://www.fastcompany.com/90442542/this-is-the-worlds-oldest-art-and-its-remarkably-beautiful.

Aquinas brings these themes to clarity in his discussion of apostasy. Heresy is a case of holding people to their oaths, and apostasy is a matter of releasing them. Aquinas invokes Pope Gregory VII (d. 1085),[64] absolutely forbidding allegiance to a ruler who is an apostate: those having taken oaths to an apostate ruler are absolved from them.[65] Apostasy is perfidy, to break fidelity. A ruler breaking trust wounds the background ethos that daily interactions rely upon. It is a Wittgensteinian insight that words of order are formalizations of the background language familiar to a people.[66] This background ethos[67] assumes social trust, distributive justice. Derived from Aristotle, distributive justice contrasts with commutative justice[68] and makes the latter possible.[69] Business contracts are examples of commutative justice, and business does not happen in low trust environments.[70] The moral, political, and religious language of the apostate prince is detached from distributive justice, the underlying trust that makes possible rule of law.[71] The prince's switch in language game necessarily detaches it from the underlying language game shaping the interactions of ordinary life. Reliance on this language

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[64] On the legal transformations wrought by Gregory in what is known as the Gregorian Reform, see PHILIPPE NEMO, WHAT IS THE WEST? 36-60 (Kenneth Casler trans., 2006).

[65] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 12, Art. 2 (The Fathers of the English Dominican Province trans., 1922).

[66] Rush Rhees, *Wittgenstein on Language and Ritual, in* WITTGENSTEIN AND HIS TIMES, *supra* note 15, at 69, 72.

[67] *See* J. C. Nyiri, *Wittgenstein's Later Work in relation to Conservatism*, *in* WITTGENSTEIN AND HIS TIMES, *supra* note 15, at 44, 44. A good illustration is the sweeping changes forcibly made in the daily life of ordinary folk in the English Reformation. *See* EAMON DUFFY, THE STRIPPING OF THE ALTARS: TRADITIONAL RELIGION IN ENGLAND 1400–1580 (1992).

[68] Graham James McAleer, *Chapter 3: Fashion and Justice: Benedict XVI and Feel Good Fashion*, ETHICS OF FASHION, https://ethicsoffashion.com/chapter-3/ (last visited Oct. 31, 2020).

[69] *See* SMITH, *supra* note 30, at 97. Reviewing the history of contract law, Smith notes: "Some solemnity is at first required to make a contract appear altogether binding." *Id.* at 97. He then gives a series of examples, some being "horrid ceremonies" of blood exchange. *Id.*

[70] Joel Kotkin, *Urban Blues*, TABLET MAG. (July 5, 2020), https://www.tabletmag.com/sections/news/articles/urban-blues-kotkin.

[71] A hint of this is found in that the earliest contracts able to be adjudicated in court in England were those signed along with an oath. *See* SMITH, *supra* note 30, at 94-95.

game is the trust basic to rule of law.[72] Oaths of allegiance are only required, argues Smith, once repair is necessary to the loss of "tacit contract,"[73] distributive justice.

During the Reformation, the period of history so important to the Court in *Miranda*, James I of England/James VI of Scotland demanded his subjects take an oath with these words: "that I do from my heart abhor, detest, and adjure as impious and heretical, this damnable doctrine," that is, the position of Gregory and Aquinas that an excommunicated prince may be killed by his subjects.[74] The pope countered that the oath could not be taken by Catholics: God cannot be a witness to it, because it is "flat contrary to Faith and salvation."[75] James complained that the pope was demanding Catholics "renounce and forswear their profession of obedience already sworn."[76] He reasoned that in birth one has sworn natural allegiance to the established prince. Aquinas would not find this reasoning strong, since it is precisely the native tongue which apostasy undermines. However, Aquinas does think James is right to see that self, speech, and order are entwined.

Pope Gregory had issued his decree some 600 years before it roiled the dissenting England of King James and John Lilburn. Aquinas explains the papal reasoning: unbelief as such does not annul political legitimacy, for dominion is a matter of human, not divine, law. However, apostasy, because it goes to the heart of social trust and distributive justice, because it switches language game, subverts the order of interaction the faithful rely upon. One is bound to the common good, not to an oath of allegiance to a regime.[77] Aquinas thus distinguishes between an oath in continuity with the background

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[72] *Id.* at 112-13 (observing that with the Reformation the protection known as *benefit of clergy* was abolished, leading to an increase in the number of offences punishable by capital punishment).

[73] *Id*. at 321.

[74] JAMES VI AND I, *supra* note 23, at 89. For De Vitoria's solution to the controversy about this doctrine in Catholic circles, see FRANCISCO DE VITORIA, ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE IIA-IIAE Q. 64 (THOMAS AQUINAS), at 161-63 (1997).

[75] JAMES VI AND I, *supra* note 23, at 90.

[76] *Id.* at 98.

[77] ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA, Pt. II-II, Q. 10, Art. 8 (The Fathers of the English Dominican Province trans., 1922); *See also* SMITH, *supra* note 30, at 296 (pointing out that anyone educated at a Catholic seminary had within six months of returning to England to profess the oath of allegiance).

language game (heresy) and abandonment of an oath diluting the trust people are reliant upon in daily life (apostasy of a prince).

CONCLUDING REMARKS

The Warren Court might worry that confession can have a disastrous "reaction in the life of the witness,"[78] but Aquinas counters that subversion of distributive justice is worse. This is why there is pressure to exclude an absolute rule forbidding compelled confessions. Aquinas could consistently argue that American jurisprudence is right to sometimes threaten contempt for not speaking and simultaneously support *Miranda*. I could also see him imagining a social scientific experiment exploring whether pressure against an absolute rule is most intense when the background language game is threatened, when acts cut deepest against trust. I suspect he would be right about how the test would turn out. It would also be curious to see if the specifics of the interrogations the Warren Court reviewed involved charges of significant breaches of trust. This is not to excuse trespass against persons, but it is to explain the pressures involved. *En banc* and unanimously, Australia's highest court condemned the kangaroo court finding Cardinal Pell guilty of child abuse.[79] Here is a passage from his account of his time in solitary confinement:

> The antipathy among prisoners toward the perpetrators of juvenile sexual abuse is universal in the English-speaking world—an interesting example of the natural law emerging through darkness. All of us are tempted to despise those we define as worse than ourselves. Even murderers share in the disdain toward those who violate the young. However ironic, this disdain is not all bad, as it expresses a belief in the existence of right and wrong, good and evil, which often surfaces in jails in surprising ways.[80]

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[78] Watkins v. United States, 354 U.S. 178, 197 (1957).

[79] Rachel Pannett & Francis X. Rocca, *Australia's High Court Quashes Cardinal George Pell's Child Sex-Abuse Conviction*, WALL ST. J. (April 7, 2020, 11:09 AM), https://www.wsj.com/articles/australias-high-court-quashes-cardinal-george-pells-child-sex-abuse-conviction-11586219863.

[80] George Cardinal Pell, *My Time in Prison*, FIRST THINGS (Aug. 2020), https://www.firstthings.com/article/2020/08/my-time-in-prison.

The likely explanation for this revulsion is that the violation of youth contradicts rule of law profoundly. The young are entrusted to adults to induct into the practices of the community, to teach them the language game.[81] As Sam Levine points out, the absolute prohibition against self-incrimination in Jewish law is a divine positive law, not a precept of natural law. It is interesting that "low-church" Scriptural Protestantism follows Jewish law, but Catholicism adopts Roman law. Not only a matter of history or politics, this adoption is likely a function of the strength of natural law reasoning in Catholic moral theology. Passages in Christian Scripture reject oaths, but Aquinas finesses these in light of a philosophical account of language and rule of law. His account draws from ancient sources and finds corroboration in Lacan and Wittgenstein. In light of this tradition, and in closing, let me briefly explain why Miranda rights are not Enlightenment or psychoanalytic rights.

Leading figure of the Scottish Enlightenment, Adam Smith, offers a reflection on false accusation. In his 1759 *The Theory of Moral Sentiments*, he writes:

> He knows perfectly that he has not been guilty: he knows perfectly what he has done; but, perhaps, scarce any man can know perfectly what he himself is capable of doing. What the peculiar constitution of his own mind may or may not admit of, is, perhaps, more or less a matter of doubt to every man. The trust and good opinion of his friends and neighbours, tends more than any thing to relieve him from this most disagreeable doubt; their distrust and unfavourable opinion to increase it. He may think himself very confident that their unfavourable judgement is wrong; but this confidence can seldom be so great as to hinder that judgement from making some impression upon him; and the greater his sensibility, the greater his delicacy, the greater his worth in short, this impression is likely to be the greater.[82]

[81] It is interesting that the charges at the trial of Socrates were defaming the gods and corrupting the youth.

[82] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 122 (1759).

Accusation alone can shake the mind's confidence in its innocence. Indeed, Smith argues that the more ethical we are, the more the self's surety of innocence is likely to wilt. This is because there is no discrete self in a "private enclave." According to Smith, moral self-awareness is a highly refined social phenomenon, impossible without exposure to, and confirmation from, a spectator and moral establishment.[83]

The idea of witness is basic to the psychoanalytical theory of Freud's greatest interpreter, Jacques Lacan. Postmodern theories of the fragmented or deferred self, harken to his discussion of the mirror stage, when an infant can mimic the playful movement of a spectator in the mirror. The image in the mirror is idealized and stands as both a beacon for, and rebuke of, the child's felt inadequacy. Ever after the child models the loved image but also resents it. The image becomes the vehicle for our speech. You and I thus live, as Lacan puts it, extimately.[84] We speak as the Other, for this semblable houses meaning, establishment and law. Our speech is thus never quite our own but suffers the play of equivocity: our speech woven into a cacophony of metaphor and metonymy (the unconscious). Lacan is a postmodern repetition of Smith's idea of the spectator. However, in treatment, the analyst prompts and cajoles the testimony of the subject in order to restrain equivocity: the analyst inquiring into why, when I mean to say *high*, I say *thigh*. The analyst teases out a healing analogy.

Miranda protections could be strengthened by a return to the model of interrogations in Scottish law, but it would still be coherent, and quite just, to trust in oaths and require the witness for the self to speak.

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[83] *Id.* at 110.

[84] JACQUES LACAN, *Logical Time and the Assertion of Anticipated Certainty*, *in* ÉCRITS, *supra* note 15, at 165.